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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 105

EASTERN CENTRAL MOTOR CARRIERS ASSOCIATION, MIDDLE ATLANTIC STATES MOTOR CARRIER CONFERENCE, INC., AND CENTRAL STATES MOTOR FREIGHT BUREAU, INC., APPELLANTS

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted district court (R. 41–44) is reported in 48 F. Supp. 432. The reports of Division 3 of the Interstate Commerce Commission (R. 9–19) and of the full Commission (R. 21–32) appear in 31 M. C. C. 193 and 34 M. C. C. 641.

JURISDICTION

The final decree of the district court was entered on March 5, 1943 (R. 44–45), and appellants' motion for rehearing was denied on March 17, 1943. The petition for appeal was filed on May 5, 1943, and the appeal was allowed on May 7, 1943 (R. 48). The jurisdiction of this Court is invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 U. S. C. 47a); Section 238 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938, par. 4 (28 U. S. C. 345); and Section 205 (h) of the Interstate Commerce Act, Part II, c. 498, 49 Stat. 543 (49 U. S. C. 305 (g)). Probable jurisdiction was noted by this Court on October 11, 1943 (R. 71).

QUESTIONS PRESENTED

The ultimate question concerns the validity of the Interstate Commerce Commission's determination that the motor-carrier rates in question were unjustly discriminatory and unreasonable in violation of Part II of the Interstate Commerce Act. The tariffs involved prescribed more favorable rates between the same points for those who shipped amounts in excess of a truckload than for those who shipped truckload amounts.

Subordinate questions are:

1. Whether the Commission might properly condemn the rates because there was no showing that

the cost of furnishing the transportation was relatively less for the larger amounts.

2. Whether it was required to consider railroad carload-rate competition a justification for this difference in treatment.

3. Whether the Commission could condemn the rates without a showing of injury to some particular shipper.

STATUTE INVOLVED

The pertinent provisions of Parts I and II of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 39-44.

STATEMENT

The facts, as they appear from the reports of the Commission, are as follows:

Appellant Eastern-Central Motor Carriers Association,[1] an incorporated association of common carriers by motor vehicle, filed certain rate schedules with the Commission on behalf of its members to become effective August 24, 1940 (R. 10). These carriers proposed to establish on hard-surface floor covering (hereafter referred to as linoleum) between various points in the East and certain points in the Midwest, rates 47.5 percent of first class,[2] minimum 20,000 pounds, and 45

[1] This is the principal appellant. The other appellants are also associations of motor common carriers who were permitted to intervene before the district court.

[2] The following discussion by Commissioner Eastman in *All Freight to Pacific Coast*, 248 I. C. C. 73, 88, may

percent of first class, minimum 30,000 pounds (R. 10–12). Prior thereto, these carriers had maintained rates 50 percent of first class, minimum 20,000 pounds, on linoleum between these points (R. 11). It was physically impossible to load 30,000 pounds of the linoleum into a single unit of equipment operated by these carriers, but the 20,000-pound minimum did represent a truckload weight of linoleum.[3] These rates were designed to meet the carload rates on linoleum, minimum 30,000 pounds, of the rail carriers between these

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prove helpful to the Court in explaining these rate designations:

> As is well known, the classifications of freight which the railroads [and also motor carriers] publish are for the purpose of governing the application of their class rates. The latter are used when no rate has been published applying specifically to the movement in question, such specific rates being called commodity rates. The railroads carry, of course, a vast multitude of separate and distinct commodities, and the class rates are a convenient device for avoiding the publication of a like multitude of separate and distinct rates. The rates for the several classes are graded in level, first class being taken as 100 percent and the other classes being given successively lower percentages, and the commodities are distributed by the classification among these various classes.

The rates here are classification-exception or commodity rates.

[3] The Commission so found (R. 17, 29). The full Commission remarked in this connection (R. 29):

> With respect to linoleum, the minimum truckload weight established by the motor carriers between the points herein is 20,000 pounds. This truckload

points, which at that time were 45 percent of first class. (R. 11, 16.) Upon protests of the western trunk-line carriers,[4] operation of the proposed schedules was suspended and the rates were made the subject of investigation and suspension proceedings by Division 3 under Section 216 (g) (*infra*, pp. 40-42) of Part II of the Interstate Commerce Act (R. 10).

Division 3, in a decision of November 17, 1941 (R. 9–19), concluded that the rates were just and reasonable and otherwise lawful except to the extent that they proposed to establish a minimum of 30,000 pounds; that the proposed minimum of 30,000 pounds was unjust and unreasonable; and that a minimum of 20,000 pounds would be just and reasonable (R. 19). Accordingly, on the same day the proposed schedules, to the extent found not just and reasonable, were ordered canceled (R. 19, 20).

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minimum weight was determined upon a consideration of the loading characteristics of the commodity and the size of truck ordinarily used in its transportation. Although 22,000 pounds can be loaded in respondents' trucks, the minimum of 20,000 pounds is not to be condemned because some reasonable leeway may be allowed between the truckload minimum weight and the maximum carrying capacity of the truck. This maximum carrying capacity is the amount which can be carried under the laws of the States through which the trucks move.

[4] At the hearing, the rail carriers, the only protestants, withdrew without offering evidence when the motor carriers agreed to adopt certain modifications in connection with the rules to be applied under these tariffs (R. 10, 22).

The report of the division contains the following pertinent discussion (R. 18–19):

> The Commission has found repeatedly that carload minimum weights should be established by rail carriers with reference to the loading capacity of their freight cars and has condemned minimum weights in excess of the loading possibilities of the rail equipment. The respondents herein have not presented to us a valid reason from the point of view of economy in transportation or otherwise, such as we have found to exist in connection with certain trainload movements, why they should be permitted to establish a minimum weight greater than is physically possible to load in the motor equipment usually used by them, and, in our opinion, no such reason exists. Strictly speaking, the proposed minimum weight of 30,000 pounds is not a truckload minimum weight but rather is a volume minimum weight, which necessitates the use of more than one unit of equipment to load and transport that quantity of linoleum. We adopt as a policy the condemnation as unreasonable of a volume minimum weight, unless it is shown clearly that, as a result thereof, motor carriers can handle the traffic at the volume minimum weight at costs per 100 pounds which are less than the costs incurred at a reasonable truckload minimum weight. * * * The record indicates that a reasonable truckload minimum on linoleum is 20,000 pounds. There is no

showing herein that operating economies would result were the proposed rates restricted to apply only when 30,000 pounds are tendered for shipment.

The case was subsequently reviewed by the full Commission and further briefed and orally argued (R. 22). The National Industrial Traffic League, as well as a representative of all the linoleum manufacturers in the United States except two, appeared in opposition to these rates, urging affirmation of the decision of Division 3 (R. 27). Proponents of the rates rested their case before the full Commission on the theory that the motor carriers could adopt rates governed by minimum weights corresponding to the carload-weight minima of the railroads, in order to meet rail competition, irrespective of whether such minimum weight of goods could be carried relatively more cheaply than a smaller amount on which there was a higher rate (R. 23–24).

The full Commission issued its decision on August 11, 1942 (R. 21–32). It affirmed the findings of Division 3 that the rates were not unjust or unreasonable except to the extent the 45 percent rates were subject to a 30,000-pound minimum (R. 31).[5] In addition, the full Commission condemned the

[5] The second full paragraph of the opinion beginning, "Upon oral argument, we find * * *," appearing at page 31 of the record, was printed in error. This paragraph was deleted from the official report of the Commission's decision. See 34 M. C. C. 648–649.

latter rates on another ground—that the "proposed rates, minimum 30,000 pounds, would give an unjust advantage to shippers of 30,000-pound lots and be unjustly discriminatory to shippers of 20,000-pound lots" (R. 31). In view of the fact that the carriers had already complied with the order of Division 3 and established rates of either 45 percent or 47.5 percent of first class, both with a minimum of 20,000 pounds, the full Commission issued no further order (R. 31–32).

The following excerpt from the full Commission's report deals with the issues here involved (R. 30–31):

> Under the respondents' proposal, a shipper tendering 20,000 pounds would pay a rate 47.5 percent of first class. If, however, another shipper were to tender 30,000 pounds, the respondents would accord it a rate 45 percent of first class, not because the cost of transporting 30,000 pounds is less than the cost of transporting 20,000 pounds, but because the motor carriers seek to establish rates subject to the same minimum as the rail carriers maintain in connection with their carload rates. The motor carriers contend that rates 47.5 percent of first class and rates 45 percent of first class are reasonable rates. If rates 45 percent of first class are reasonable on any shipments exceeding a truckload, they are reasonable for all truckload shipments unless, as in the *Molasses case*, the cost of

transporting quantities exceeding a truckload is less than that of transporting a truckload. In the absence of such a showing of dissimilar circumstances and conditions, the rates 45 percent of first class should not be accorded to one class of shippers, those which tender 30,000 pounds at a time, and denied to another class of shippers, those tendering 20,000 pounds at a time.

The motor carriers contend that the existence of the competition of the rail carriers which maintain rates 42.5 percent of first class, minimum 30,000 pounds, constitutes a dissimilarity in circumstances and conditions sufficient to prevent us from finding that unjust discrimination results from the maintenance of lower rates on 30,000-pound than on 20,000-pound shipments. The extent to which competition between carriers may render discrimination and prejudice not unlawful must be decided upon the facts in each case. In *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, the United States Supreme Court held that the innocent character of a discrimination is not established, as a matter of law, by showing that the preferential rate is given to others to develop traffic on the carrier's own lines or to secure competitive traffic. The Court further held that these are factors to be considered by the Commission; but they do not preclude a

finding that the discrimination practiced is unjust.

The existence of competition between motor and rail carriers does not relieve either type of carrier from according shippers reasonable rates, nor does it render lawful unlimited discriminations and prejudices. The competition between rail and motor carriers for linoleum traffic does not constitute such a dissimilarity in circumstances and conditions as to render legal the proposed discrimination.

On October 13, 1942, appellant Eastern Central Motor Carriers Association instituted suit in the United States District Court for the Southern District of New York, to set aside Division 3's order of November 17, 1941 (R. 1–8). As previously indicated, the other appellant associations were permitted to intervene as plaintiffs. Final hearing was held before a specially constituted three-judge court on November 2, 1942 (R. 44). The court entered a written opinion on January 2, 1943 (R. 41–44). It entered findings of fact and conclusions of law on February 9, 1943 (R. 39–40), and a final decree dismissing the complaint on March 5, 1943 (R. 44–45). Appellants' motion for rehearing was denied by the court on March 17, 1943.*

* This order was omitted in printing the record but appears at page 52-E of the original record before this Court.

SUMMARY OF ARGUMENT

I

The Commission properly held that the difference in rates between the 20,000-pound shipper and the 30,000-pound shipper was unjustly discriminatory and unreasonable.

The Commission did not lay down any rate-making policy of its own not warranted by the statute. Its declaration that it would regard a difference in rates such as existed here as unjustly discriminatory and unreasonable unless justified by a differential in transportation costs and despite the existence of railroad competition, was merely a reflection of its informed judgment that under the statutory policy forbidding unjustly discriminatory and unreasonable rates, these rates were unlawful. Within its statutory sphere, the Commission is in fact a policy-making body. Questions of what is an unreasonable rate and what is an unjust discrimination are questions of ultimate fact for the Commission's determination, and the courts will not interfere with the Commission's decisions with respect thereto except for error of law or other unusual circumstances. *Illinois Central Railroad* v. *Interstate Commerce Commission*, 206 U. S. 441, 455, 456; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352–353; *Barringer & Co.* v. *United States*, 319 U. S. 1, 6–7. The Commission did not depart from the applicable legal standard in discrimination cases,

which is that the differences in circumstances to be considered as a possible justification for the discrimination must relate to the transportation services performed and not be extraneous thereto. *Wight* v. *United States,* 167 U. S. 512, 518; *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.,* 225 U. S. 326, 342; *Barringer & Co.* v. *United States,* 319 U. S. 1, 6. Differences in the cost of furnishing transportation are obviously germane to the transportation services performed and therefore under the above standard a proper factor to be considered by the Commission in ascertaining whether different treatment of different shippers is unreasonable or unjustly discriminatory, as this Court has recognized. *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad,* 145 U. S. 263, 281–282; *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.,* 220 U. S. 235, 240–241, 252; *Northern Pacific Ry. Co.* v. *United States,* 316 U. S. 346, 348. The Commission did not hold that it was not legally authorized to consider the defense of railroad competition. Instead, it weighed this defense and found it an insufficient justification for the different treatment of these shippers. The existence of competition and the weight to be given to it as a justification are exclusively factual questions for the Commission rather than for the courts, and the Commission is not required to set forth its exact reasons for not considering the existence of competition a controlling justification here.

Condemnation of the present rates was in accord with the Commission's consistent policy of rejecting as unlawful all discrimination between shippers based upon the size of the shipment presented unless it is shown that the differences in treatment reflect differences in relative transportation costs.

II

It is immaterial that individual shippers of 20,000-pound lots may in fact be in an economic position to furnish 30,000-pound lots instead, and thus secure the lower rate on the 30,000-pound shipments. Any contention to the contrary is necessarily based on the assumption that the Commission is powerless to prevent discrimination and unreasonable rate differences, in a case where reparations are not involved, unless pecuniary damage to individual shippers is established. But this Court has recognized that the Commission in its capacity as protector of the general shipping public may in such a case strike down such practices without proof of damage to individual shippers. *Great Northern Ry.* v. *Sullivan,* 294 U. S. 458, 462; see *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, 353–354.

ARGUMENT

I

THE COMMISSION PROPERLY HELD THAT THE DIFFERENCE IN THE RATES WAS UNJUSTLY DISCRIMINATORY AND UNREASONABLE

A. THE COMMISSION'S ACTION IN CONDEMNING THIS DIFFERENCE IN RATES BECAUSE THERE WAS NO SHOWING THAT IT WAS BASED ON CORRESPONDING DIFFERENCES IN THE COST OF FURNISHING THE TRANSPORTATION AND DESPITE THE EXISTENCE OF RAILROAD COMPETITION, WAS WITHIN ITS STATUTORY POWER

Part II of the Interstate Commerce Act (Section 216 (d), *infra*, p. 40) makes it unlawful for motor carriers to charge rates which result in "unjust discrimination" or are "unjust and unreasonable." The phrases "unjust and unreasonable" and "unjust discrimination" are unquestionably words of art borrowed[1] from well-known corresponding language in Part I of the Act forbidding similar practices by rail carriers (Sections 1 (5) (a) and 2, 49 U. S. C. 1 (5) (a) and 2, Appendix, *infra*, p. 34). Accordingly, the Commission has frequently recognized that administrative and judicial precedents dealing

[1] The legislative history of the original Motor Carrier Act of 1935 (49 Stat. 543) indicates that the Act was intended to be part of a complete and coordinated program of legislation touching all forms of transportation. See S. Rep. 482, 74th Cong., 1st sess., p. 3. This general program was carried to fruition by the Transportation Act of 1940 (54 Stat. 898), when water carriers were also subjected to the Commission's jurisdiction.

with unjust discrimination by railroads under Section 2 must be given proper significance in dealing with questions of discrimination by motor carriers. *E. g., Arrangements Arrow Carrier Corp. and Duplan Silk Corp.,* 4 M. C. C. 657, 677; *Chicago and Wisconsin Points Proportional Rates,* 17 M. C. C. 573, 578; *Consolidation Rule on Shipments at Seattle and Spokane,* 22 M. C. C. 295, 299. This Court has followed the same pattern by implication, citing railroad discrimination decisions as applying in motor-carrier discrimination cases, and motor-carrier decisions as applying in railroad discrimination cases. *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, 352–353; *Barringer & Co.* v. *United States,* 319 U. S. 1, 7–8. No reason appears why the same weight should not be given under Part II to precedents dealing with reasonableness of rates under Part I.

With the importance of the railroad precedents in mind, we approach appellants' principal contention. This is the contention that the Commission's decision is void because it laid down a policy of its own allegedly not warranted by the statute, that it would regard a difference in rates such as existed here as unjustly discriminatory and unreasonable[8] unless based on a differential

[8] Merely because each of these rates was found by the Commission, so far as absolute level was concerned, to be within the zone of reasonableness (R. 31) does not mean that the Commission was powerless to consider them un-

in transportation costs and despite the existence of railroad carload-rate competition (Br. 12–16). Reliance is placed by appellants in this connection solely on *Southern Pacific Co.* v. *Interstate Commerce Commission*, 219 U. S. 433, 443,[9] where an order of the Commission was set aside because it had rejected railroad rates not because they were unreasonable, as it might have done under the statute, but merely because they were regarded as inequitable to shippers. The inapplicability of this case is readily apparent. Here the Commission's declaration of policy, if it may be called such, as in *United States* v. *Illinois Central R. R.*, 263 U. S. 515, 525–526, was not a statement of a policy of rate-making of its own not warranted by the statute, but merely a reflection of its informed judgment that under the statutory policy prohibiting unjustly discriminatory and unreasonable rates the present rates were unlawful.

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reasonable in relation to each other because of their discriminatory nature. Rates or practices have often been held unreasonable because of their discriminatory nature. *E. g., Atchison, T. & S. F. Ry.* v. *United States*, 279 U. S. 768; *Northern Pacific Ry. Co.* v. *United States*, 316 U. S. 346. Minimum-weight provisions clearly affect the total charges for transportation. *Wheler Co.* v. *Director General*, 59 I. C. C. 699, 701.

[9] Appellants cite two other cases (*Interstate Commerce Commission* v. *Union Pacific R. R.*, 222 U. S. 541, and *United States* v. *Illinois Central R. R.*, 263 U. S. 515) but admit that the Commission's orders were upheld in those cases (Br. 15).

Appellants completely overlook the fundamental proposition that the Commission, within its appointed statutory sphere, is a policy-making body. The determination of the validity of rates is peculiarly a task for the Commission, exercising an enlightened judgment as an expert body, a task which the Commission by training and experience is well qualified to perform.[10] *Mississippi Valley Barge Co.* v. *United States,* 292 U. S. 282, 286. It is a familiar rule that both the questions of what is an "unreasonable" rate and what is an "unjust discrimination" are questions of ultimate fact to be decided by the Commission in the exercise of its judgment and discretion and that the courts will not interfere with the Commission's determination of these questions unless the determination is unsupported by evidence, without rational basis, based upon an erroneous construction of law, or otherwise amounts to an abuse of power. *Cincinnati, New Orleans & Texas Pacific Ry.* v. *Interstate Commerce Commission,* 162 U. S. 184, 194, 196; *Illinois Central Railroad* v. *Interstate Commerce Commission,* 206 U. S. 441, 455, 456; *Interstate Commerce Commission* v. *Chicago,*

[10] Judge Dobie recently stated in speaking of the Commission in *Virginia Stage Lines* v. *United States,* 48 F. Supp. 79, 83 (W. D. Va., three-judge court):

> The notion that only a court (if anyone) can "discover" and "announce" rules of law which are immutable principles to be plucked from the sky and applied with inexorable logic is a philosophy of jurisprudence to which this Court does not subscribe.

Rock Island & Pacific Ry., 218 U. S. 88, 110–111; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 481; *United States* v. *Chicago Heights Trucking Co.*, 310 U. S. 344, 352–353; *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546; *Barringer & Co.* v. *United States*, 319 U. S. 1, 6–7.

The particular application of these principles to decisions of the Commission involving discrimination under motor-carrier rates is well illustrated by the following excerpt from the *Chicago Heights Trucking Co.* case (310 U. S. 344, 352–353):

> "It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which from its peculiar character would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case preference or discrimination existed." [*United States* v. *Louisville & Nashville R. Co.*, 235 U. S. 314, 320.] And where a court substituted "its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, [the court] obviously exerted an authority not conferred upon it by the statute." [*Idem.*] * * * The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful

> discrimination when "undue," "unjust," "unfair," and "unreasonable." And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination. [Cases cited.]

While the Commission must follow recognized legal standards in condemning or condoning discrimination, the only criterion which has been developed for this situation is that the difference in circumstances to be considered as a possible justification for the discrimination must relate to the transportation services performed and not be extraneous thereto. *Wight* v. *United States,* 167 U. S. 512, 518; *Interstate Commerce Commission* v. *Baltimore & Ohio R. R.,* 225 U. S. 326, 342; *Barringer & Co.* v. *United States,* 319 U. S. 1, 6. In the *Barringer* case, this Court said last Term (319 U. S. 1, 6):

> *But differences in rates as between shippers are prohibited only where the "circumstances and conditions" attending the transportation service are "substantially similar."* Whether those circumstances and conditions are sufficiently dissimilar to justify a difference in rates, or whether, on the other hand, the difference in rates constitutes an unjust discrimination because based primarily on considerations relating to the identity or competitive position of

> the particular shipper *rather than to circumstances attending the transportation service,* is a question of fact for the Commission's determination. * * * [Italics supplied.]

It was apparently because the Commission departed from this standard and sought to sustain a discrimination as not unjust on differences not germane to the transportation service performed, that its order considered in *Mitchell* v. *United States,* 313 U. S. 80, was set aside.

In the present case, it is plain that the Commission, in exercising its judgment, followed this legal standard. It considered that the important difference in conditions, which appellants would have to prove to justify the more favored treatment of shippers of amounts in excess of truckload, as compared with truckload shippers, was that the favored treatment should reflect corresponding savings in the relative cost of furnishing the transportation. Certainly differences in cost of furnishing transportation are, on their face, germane to the transportation service performed, and thus under the above standard a proper factor to be considered. This Court has frequently recognized that difference in costs is a vitally important consideration as a possible justification for discriminations which might otherwise be unjust. *Interstate Commerce Commission* v. *Baltimore & Ohio Railroad,* 145 U. S. 263, 281–282; *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.,*

220 U. S. 235, 240–241, 252, where it was said that—

> The contention that a carrier when goods are tendered to him for transportation can make the mere ownership of the goods the test of the duty to carry, or, what is equivalent, may discriminate in fixing the charge for carriage, not upon any difference inhering in the goods or in the cost of the service rendered in transporting them, but upon the mere circumstance that the shipper is or is not the real owner of the goods is so in conflict with the obvious and elementary duty resting upon a carrier, and so destructive of the rights of shippers as to demonstrate the unsoundness of the proposition by its mere statement. * * * (220 U. S. 235, 252.)

Similarly, in cases involving the issue of reasonableness of particular rates, cost of furnishing the service has been considered an important factor in considering the level of the rate (*Northern Pacific Ry.* v. *Dept. of Public Works,* 268 U. S. 39, 43), and differences in revenue considerations have been treated as a possible justification for different treatment of shippers. *Northern Pacific Ry. Co.* v. *United States,* 316 U. S. 346, 348.

There was likewise nothing illegal in the Commission's failure to treat appellants' claim as to the existence of rail competition as a justification for this difference in rates. Reference to the Commission's report (*supra,* pp. 9–10) reveals that the

Commission did not indicate that it thought it was powerless to consider the defense of competition here. The Commission merely said that the "extent to which competition between carriers may render discrimination * * * not unlawful must be decided upon the facts in each case" (R. 30) and held that in the instant case, everything considered, "the competition between rail and motor carriers for linoleum traffic does not constitute such a dissimilarity in circumstances and conditions as to render legal the proposed discrimination" (R. 30–31). In other words, the Commission weighed the defense of competition and found it an insufficient justification. This Court has recognized that there is a clear distinction between refusing to consider competition at all, and in refusing, after weighing it, to treat it as an absolute defense. Thus, orders of the Commission have been set aside where the Commission adopted the view that it was powerless under the language of the statute to consider competition as a defense to charges that rates were unlawful under various provisions of Part I. *Texas & Pacific Railway* v. *Interstate Commerce Commission*, 162 U. S. 197, 204, 207, 210; *Louisville & Nashville Railroad Co.* v. *Behlmer*, 175 U. S. 648, 672–673. But, in contrast, it has been held that the questions of the existence of competition and the weight to be given to it as a defense are exclusively factual questions for the Commission, in

which its decision will not be overridden by the courts, whether the inquiry is as to the reasonable, prejudicial or discriminatory nature of rates. *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144, 166; *Illinois Central Railroad* v. *Interstate Commerce Commission*, 206 U. S. 441, 455–461; *United States* v. *Illinois Central R. R.*, 263 U. S. 515, 525;[11] *Barringer & Co.* v. *United States*, 319 U. S. 1, 7. In the *Barringer* case, the following was said with particular reference to discrimination (319 U. S. 1, 7):

> It has long been established by our decisions that differences in competitive conditions may justify a relatively lower line-haul charge over one line than another, and that it is for the Commission, not the courts, to say whether those differences are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful. * * *

And merely because the Commission has the power to prevent destructive competition by fix-

[11] In that case, the Court said: (263 U. S. 515, 525):

> The innocent character of the discrimination practiced by the Illinois Central was not established, as a matter of law; by showing that the preferential rate was given to others for the purpose of developing traffic on the carrier's own lines or of securing competitive traffic. These were factors to be considered by the Commission; but they did not preclude a finding that the discrimination practiced is unjust. * * *

ing the level of rates at a reasonable minimum certainly does not mean, as appellants urge (Br. 30–33), that all competition must be accepted as an absolute excuse for discrimination between shippers.

While the weight given to competition by the Commission is thus not open to review, it may be pointed out that there was, nevertheless, a clear basis for the Commission's conclusion that the existence of railroad competition in the present case did not justify this rate discrimination. It is to be remembered that this Court for a long time held that while competition might be considered a defense to a charge of undue preference under Section 3, the Commission could not lawfully consider competition at all when the alleged violation was of Section 2 (*i. e.*, discrimination, in the limited technical sense, between two shippers over the same line between the same points, as in the present case). *Wight* v. *United States*, 167 U. S. 512, 516–518; *Interstate Commerce Commission* v. *Alabama Midland Ry.*, 168 U. S. 144, 166–167; *Seaboard Air Line Ry. Co.* v. *United States*, 254 U. S. 57, 62. Nevertheless, in the *Barringer* case, it was held that competition might be considered as a possible defense even in a Section 2 discrimination case, though, as above indicated, it was held that the weight to be given to competition was for the Commission. The facts of the *Barringer* case were, however, somewhat anom-

alous. Section 2 was recognized as applying because the loading services involved were identical and despite the fact that the related line-hauls were over different routes. The differences in competition held to be a justifying factor under Section 2 there actually related to differences in competition over different routes. While this distinction can scarcely be said to go to the power of the Commission to consider competition as a defense, it can certainly be considered in determining the weight to be given competition as a justification. Rates involving the same commodity over different routes are necessarily subject to more competitive influences than those involving the same commodity over the same route. Preferred treatment of the large shipper over the small shipper with respect to shipments over an identical route may well be considered a more egregious form of discrimination, merely because of its tendency to concentrate business in the hands of those already large.

Contrary to appellants' contentions (Br. 28–29), the Commission was not required to make a specific finding of fact as to why it did not consider the existence of rail competition a justification here. The Commission is required only to set forth the basic or quasi-jurisdictional facts upon which its opinion rests and is not required to "specify the weight given to any item of evidence or disclose mental operations by which its decisions are

reached." *Baltimore & Ohio R. Co.* v. *United States,* 298 U. S. 349, 359; *United States* v. *Baltimore & Ohio R. R. Co.,* 293 U. S. 454, 464–465.

Nor is there any indication that the Commission in its decision attempted to allocate traffic between the motor carriers and railroads on the basis of their unit costs of operation or otherwise, as appellants urge (Br. 36–39). Motor carriers are left free to compete with railroad carload-rates. All that the Commission insists upon is that the motor carrier in meeting the railroad rates on carload lots, accord to shippers of truckload amounts, where the relative cost of transportation is no greater, the same rate accorded to those shipping larger amounts.

B. THE COMMISSION'S ACTION WAS IN ACCORD WITH ITS CONSISTENT POLICY OF CONDEMNING ALL RATE FAVORITISM BASED ON THE SIZE OF THE SHIPMENT, EXCEPT WHERE THE DIFFERENCES IN TREATMENT REFLECT DIFFERENCES IN RELATIVE TRANSPORTATION COSTS

The condemnation of the present rates by the Commission was plainly in accord with the policy consistently followed by it of rejecting as unlawful all discriminations between shippers based upon the size of the shipment presented unless it is shown that the differences in treatment reflect differences in relative transportation costs. See Sharfman, *The Interstate Commerce Commission* (1931), Vol. III–B, pp. 395–413.

The Commission gave voice to this principle early in its history. In *California Commercial*

Association v. *Wells, Fargo & Co.*, 14 I. C. C. 422, 431,[12] it observed:

> It appears thus to be universally recognized that the only discrimination which can legally be made between a large shipment and a small one must be based upon the difference in the cost of service. It necessarily follows that when this difference in the cost of service is eliminated, the reason for the discrimination entirely fails. * * *

Even earlier, in 1888, the Commission had accepted the validity of lower railroad rates per unit on carload amounts than on less-than-carload amounts. But the Commission made it clear that it was not granting any vague concession to quantity transport, but according recognition to marked differences in cost between two sharply distinguishable modes of shipment. *Scofield* v. *Lake Shore & Michigan Southern Ry. Co.*, 2 I. C. C. 90, 93. The importance of the cost differential as a justification for lower carload rates was empha-

[12] The Commission there condemned as discriminatory the exaction by a carrier of a higher rate for handling an amount of merchandise when owned by several individuals and bulked together, than when presented by a single consignor. This was on the ground that the cost of handling the bulked shipment was no greater. These same principles were followed by the Commission in another similar case decided the same day, *Export Shipping Co.* v. *Wabash Railroad Co.*, 14 I. C. C. 437, and the Commission's decision in the latter case was sustained in *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.*, 220 U. S. 235, 248.

sized by this Court in *Interstate Commerce Commission* v. *Delaware, L. & W. R. R.*, 220 U. S. 235, 240–241, where it was said:

> Without detailing the theory upon which this conception was based it suffices broadly to say that it embodied the assumption that a carload was the unit of shipment, and rested upon the difference which existed between the cost of service in the case of a carload shipment by one consignor to one consignee and that occasioned by a shipment in one car of many packages by various consignors to various consignees. * * *

From the beginning also, and almost without exception since, the Commission has condemned railroad rates which were lower on trainload or multiple-car lots than on carload lots.[13] Likewise, the Commission has consistently refused, as in the present case, to approve motor-carrier rates which were lower for amounts in excess of truckload than

[13] *Paine Bros. & Co.* v. *Lehigh Valley R. Co.*, 7 I. C. C. 218, 223; *Planters' Compress Co.* v. *Cleveland, C., C. & St. L. Ry. Co.*, 11 I. C. C. 382, 403; *Anaconda Copper Mining Co.* v. *Chicago & E. R. Co.*, 19 I. C. C. 592, 596; *Rickards* v. *Atlantic Coast Line*, 23 I. C. C. 239, 240; *Woodward-Bennett Co.* v. *S. P., L. A. & S. L. R. R. Co.*, 29 I. C. C. 664, 665; *American Round Bale Press Co.* v. *A. T. & S. F. Ry. Co.*, 32 I. C. C. 458, 463–464; *J. W. Wells Lumber Co.* v. *Chicago, M. & St. P. Ry. Co.*, 38 I. C. C. 464, 465; *Miller & Lux* v. *S. P. Co.*, 41 I. C. C. 617, 619–620; *Molasses From New Orleans, La. to Peoria and Pekin, Ill.*, 235 I. C. C. 491–498.

for truckload amounts.[14] The basis generally announced for this principle was that such rates would discriminate in favor of large shippers at the expense of small shippers,[15] but some of the

[14] *Iron and Steel from Pittsburgh and Aliquippa, Pa.*, 21 M. C. C. 791, 792; *Trunk Line Territory Motor Carrier Rates*, 24 M. C. C. 501, 582; *Petroleum Products, Bolivar, N. Y., to Farmers Valley, Pa.*, 28 M. C. C. 527, 529; *Coal, Wyoming to Idaho Falls*, 29 M. C. C. 335, 340–341.

While the Commission did approve certain rates subject to a minimum of 30,000 pounds (in excess of a truckload) in *Carpets and Carpeting, Official to Southern Territory*, 237 I. C. C. 651, that decision did not purport to be conclusive on the issue. Thus, the Commission said in that case (at pp. 657–658):

> We are not convinced that it would be reasonable for the motor carriers to establish a minimum of 30,000 pounds in connection with the postponed column 45 basis, because it would require more than one unit of equipment to transport 30,000 pounds. On this record, however, we are not prepared to say that the column 45 rates, minimum 30,000 pounds, where not lower than the corresponding proposed rail-water carload rates, would be unlawful, provided that a rule is made applicable in connection therewith to the effect that shipments of not less than 30,000 pounds actually will be received at and transported from the point of origin from one shipper in one day and on one bill of lading.

The full Commission said of that decision in its present decision (R. 31):

> That report was issued over a year ago and now we are convinced that * * * our doubts as expressed therein [were] well founded * * *.

[15] See, *e. g.*, *Anaconda Copper Mining Co.* v. *Chicago & E. R. Co.*, 19 I. C. C. 592, 596.

cases have indicated that such a rate difference was also unreasonable."[16]

It is apparent that originally reduced rail rates based upon minimum weights in excess of carloads were held unlawful by the Commission even though it was shown that the carrier could transport such weights more economically than carload weights. Thus, the Commission stated in *American Round Bale Press Co.* v. *A. T. & S. F. Ry. Co.*, 32 I. C. C. 458, 463–464:

> The Commission has declined in notable instances to allow economies of carriage to control in the matter of setting preferential rates. For example, it has repeatedly and without exception refused not only to establish, but even to permit, the establishment of rates available only for the shipment of a trainload. Though such shipment could be transported at a minimum of expense per unit of weight and the carriers could well afford to make lower rates upon it, yet those rates would so discriminate in favor of the large shippers and tend to concentrate the business in their hands that proper considerations have compelled disapproval. * * *

However, in 1939, the Commission, to some extent relaxed this strict rule and for the first and only time held not unlawful certain railroad rates which were lower on multiple-carload shipments than

[16] *Rickards* v. *Atlantic Coast Line*, 23 I. C. C. 239, 240; *Miller & Lux* v. *S. P. Co.*, 41 I. C. C. 617, 619–620; *Coal, Wyoming to Idaho Falls*, 29 M. C. C. 335, 340.

on carload shipments. *Molasses From New Orleans, La., to Peoria and Pekin, Ill.*, 235 I. C. C. 491. It appears from the Commission's report that while this reduced volume rate was designed to meet the competition of cargo movements by private barge, the railroads also established that their operating costs would be considerably less when a single multiple-car consignment was presented than when a single car was presented. The Commission has since recognized, as it did in the present case (R. 28), that it regarded the crucial, justifying factor in the *Molasses* case as not solely competition, but rather the existence of the saving in costs under the multiple-car shipments. *Petroleum Products, Bolivar, N. Y., to Farmers Valley, Pa.*, 28 M. C. C. 527, 529. And where there was not a complete showing made as to a cost differential; it has since refused to approve both multiple-carload rates and motor-truck rates in excess of truckload capacity. *Petroleum Rail Shippers' Ass'n* v. *Alton & S. R.*, 243 I. C. C. 589, 642–655; *Petroleum Products, Bolivar, N. Y., to Farmers Valley, Pa.*, 28 M. C. C. 527, 529; *Coal, Wyoming to Idaho Falls*, 29 M. C. C. 335, 340.

Finally, it should be noted that the Commission has also held invalid, as discriminatory, railroad rates on freight shipped in containers, which were relatively higher for one minimum weight than for an alternative and greater minimum weight. *Container Service*, 173 I. C. C. 377. There again, the necessity for a showing of cost differential as

a justification for this difference in treatment was emphasized, the Commission observing (at pp. 443–444):

> * * * as we interpret section 2 of the act, and as it has been interpreted for us by the Supreme Court, we cannot approve varying rates based on the weight of the lading offered for container shipments except upon a record which establishes that charges so determined are warranted by differences in the cost and quality of the service. * * *

Surely then, it is evident that the Commission's insistence upon a showing of a cost differential in the present case and its refusal to consider railroad competition controlling, were in accord with its settled practice. Such a well-established test for determining whether proposed rates would result in "unjust discrimination" and be "unjust and unreasonable" (sec. 216 (d) and (g)) is entitled to great weight. Cf. *Boston & Maine R. R.* v. *Hooker,* 233 U. S. 97, 118; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 492; *United States* v. *Chicago North Shore R. R.,* 288 U. S. 1, 13.

II

THE COMMISSION'S ORDER IS VALID EVEN IN THE ABSENCE OF A SHOWING THAT ANY INDIVIDUAL SHIPPER WOULD NECESSARILY SUFFER DAMAGE FROM THIS DISCRIMINATION

Appellants contend (Br. 16–21) that the Commission's order is invalid because there was noth-

ing in the record to show that any shipper who could secure the 20,000-pound rate could not just as well furnish enough linoleum to secure the lower rate on 30,000 pounds, and thus no showing that there would in fact be discrimination against any individual shipper.

It may be pointed out that there is nothing in the record before the Commission to support the statement (Br. 17) that 30,000 pounds is the normal unit of quantity purchase and sale of linoleum. The fact that the railroads fix their carload rates with a 30,000-pound minimum, upon which appellants rely, does not so indicate for, as the Commission points out (R. 29), "the primary factors considered in fixing carload minimum weights are the loading characteristics of the commodities moving in carload quantities and the necessity for insuring an efficient use of the carriers' equipment." The comparable weight for trucking equipment was, in the Commission's opinion, the truckload amount of 20,000 pounds (R. 29).

But the contention, in any event, is the equivalent of asserting that a rate cannot be condemned as discriminatory or unreasonable in the absence of a showing that individual shippers will suffer pecuniary damage therefrom. It overlooks the fact that under settled principles the Commission may, in its capacity as protector of the general shipping public, strike down rates as discriminatory or un-

reasonable without any such showing.[17] It was so held with respect to the question of reasonableness in *Great Northern Ry.* v. *Sullivan,* 294 U. S. 458, 462, where it was pointed out that—

> The commission has power to determine rates to be unreasonable in violation of § 1 without determining whether their application has resulted or will result in pecuniary damage to the shipper. * * *

This same principle has in effect been recognized by the Commission in many discrimination cases, where it has been held that a complainant in such a case need not establish that he is in a competitive relationship with the allegedly preferred shipper. *National Spring & Wire Co.* v. *Director General,* 60 I. C. C. 564, 566; *Barber Asphalt Co.* v. *L. & N. R. R.,* 88 I. C. C. 307, 309; *Chicago & Wisconsin Points Proportional Rates,* 17 M. C. C. 573, 579. This principle was recognized also with respect to motor-carrier discrimination in *United States* v. *Chicago Heights Trucking Co.,* 310 U. S. 344, sustaining the Commission's action in the *Chicago & Wisconsin Points* case, where it was said (310 U. S. 344, 353–354):

> The fact that the Commission acted on its motion without complaints by individual shippers did not detract from the Commis-

[17] While a showing of pecuniary injury is, of course, essential to the granting of reparations under Part I of the Act (secs. 13–16), it is to be noted that the Commission is not empowered to grant reparations under Part II.

> sion's power to protect and maintain a transportation system free from partiality to particular shippers. The Commission acted in its capacity as a public agency and carried out duties imposed upon it by Congress in the interest of shippers generally, the national transportation system and the public interest. * * *

See also *Inland Steel Co.* v. *United States,* 306 U. S. 153, 157.

In the *Chicago Heights Trucking Co.* case, less-than-truckload rates had been established from a so-called reforwarding point, which were lower on traffic that had moved into the reforwarding point as part of a truckload or carload consignment than on traffic that had not so moved. This Court sustained the Commission's conclusion that such rates constituted an unjust discrimination in favor of freight forwarders and against other shippers. Presumably, these other shippers might have avoided damage from this discrimination by employing the forwarders; yet there is no indication that this fact was considered at all material by the Commission or the Court. Furthermore, the fact that under Section 216 (g) (*infra*, pp. 40-42) the Commission is authorized to institute investigation and suspension proceedings with respect to rates, on its own initiative, as well as on the complaint of interested parties, is a strong indication that Congress did not consider damage to individual shippers essential.

There is nothing contrary to these principles in *Penn Refining Co.* v. *Western New York and P. R. Co.*, 208 U. S. 208, and *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 42, upon which appellants rely (Br. 17–19). In the former case, this Court refused to enforce a reparation order of the Commission, granting an award of damages to shippers of oil in barrels, based on discrimination against them in favor of oil shipped in tank-cars. The alleged discrimination grew out of the carriers' practice of charging for the weight of the container on barrel shipments but not on tank-car shipments. The Court refused to enforce the order because it was found that the barrel shippers were not in an economic position to have used tank-cars and never had asked for them. If this case is to be considered an indication that pecuniary damage to shippers is necessary to establish unjust discrimination, it is readily distinguished by the fact that the Court had before it a reparation case. Naturally, proof of personal damages is necessary for the recovery of a money award for past overcharges. But that does not mean that it should be considered necessary in a case such as the present where the Commission is only ordering cessation for the future of unreasonable rate differences and discrimination. Cf. *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370. In the *Diffenbaugh* case, the Court set

aside a Commission order which had condemned the practice whereby carriers paid grain dealers who owned elevators an allowance for elevating their own grain. The Commission had held that this resulted in undue preference in their favor as against dealers who did not own and operate elevators, and the case was thus strictly one involving undue preference rather than unjust discrimination. While the Court observed that the law does not "equalize fortune, opportunities or abilities" (222 U. S. 42, 46), the decision was rested squarely on the fact that Congress only a short time before had specifically authorized the payment of reasonable allowances by carriers to shippers for performing part of the carriers' transportation for them.

Finally, it should be noted too that in the present case the shippers themselves were in fact concerned over this discrimination, as is indicated by the following statement, appearing in the report of the full Commission (R. 27):

> At the oral argument, a representative of all of the manufacturers of linoleum in the United States, except two, questioned the propriety of volume rates subject to minimum weights in excess of the quantity which can be loaded into a truck. The linoleum manufacturers also contend that rates made on such a basis are unsound and request that we affirm the findings of division 3.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decree of the district court should be affirmed.

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APPENDIX

Part I of the Interstate Commerce Act, February 4, 1887, c. 104, 24 Stat. 379, as amended.

Section 1 (5) (a) provides:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful. (49 U. S. C. 1 (5) (a).)

Section 2 provides:

> That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this Act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful. (49 U. S. C. 2.)

Part II of the Interstate Commerce Act, August 9, 1935, c. 498, 49 Stat. 543, as amended.

Section 216 provides in part:

(d) All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. It shall be unlawful for any common carrier by motor vehicle engaged in interstate or foreign commerce to make, give, or cause any undue or unreasonable preference or advantage to any particular person, port, gateway, locality, region, district, territory, or description of traffic, in any respect whatsoever; or to subject any particular person, port, gateway, locality, region, district, territory, or description of traffic to any unjust discrimination or any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this subsection shall not be construed to apply to discriminations, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

* * * * *

(g) Whenever there shall be filed with the Commision any schedule stating a new individual or joint rate, fare, charge, or classification for the transportation of passengers or property by a common carrier or carriers by motor vehicle, or by any such carrier or carriers in conjunction with a common carrier or carriers by rail-

road and/or express, and/or water in interstate or foreign commerce, or any rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Commission is hereby authorized and empowered upon complaint of any interested party or upon its own initiative at once and, if it so orders, without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such rule, regulation, or practice, and pending such hearing and the decision thereon the Commission, by filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, or charge, or such rule, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after hearing, whether completed before or after the rate, fare, charge, classification, rule, regulation, or practice goes into effect the Commission may make such order with reference thereto as would be proper in a proceeding instituted after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, or charge, or classification, rule, regulation, or practice, shall go into effect at the end of such period: *Provided,* That this paragraph shall not apply to any initial schedule or schedules filed on or before July 31, 1938, by any such carrier in

bona fide operation when this section takes effect. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable. (49 U. S. C. 316 (d) and (g).)

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